

**A SK M&E Bersekutu Sdn Bhd (formerly known as
Kejuruteraan Elektrik Seong Keng Sdn Bhd) v Pembinaan
Legenda Unggul Sdn Bhd (in voluntary liquidation) (formerly
known as Encorp Construct Sdn Bhd) and another case**

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
NOS 24NCC(ARB)-42-11 OF 2015 AND 24NCC(ARB)-52-12 OF
2015

C LAU BEE LAN J
30 NOVEMBER 2016

D *Civil Procedure — Preservation of property — Rights to preserve specific fund in
dispute — Plaintiffs completed construction works as agreed with defendant
— Defendant refused to release retention sum — Defendant undergone process of
being voluntarily wound up by its member — Whether order to preserve retention
monies should be granted*

E *Civil Procedure — Proceedings — Leave application — Plaintiffs completed
construction works as agreed with defendant — Defendant refused to release
retention sum — Defendant undergone process of being voluntarily wound up by
its member — Whether leave should be granted to plaintiffs to commence and/or
proceed with legal proceedings*

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This was a judgment in relation to two suits ('Suits 42 and 52') filed by two
different parties, firstly, SK M&E Bersekutu Sdn Bhd ('the first plaintiff') and
secondly, Geohan Sdn Bhd ('the second plaintiff') against Pembinaan Legenda
Unggul Sdn Bhd ('the defendant'). Suit 42 was the action brought by the first

G plaintiff whereas Suit 52 was the action brought by the second plaintiff. In both
suits, the plaintiffs contended that the defendant, vide subcontracts, had
appointed the plaintiffs as the subcontractors to complete construction works.

H There were provisions in the subcontracts which provided that the defendant
shall release the retention sum upon the issuance of the certificate of practical
completion and upon the end of the defect liability period. The plaintiffs had
fulfilled what was required under the subcontracts but the defendant refused,
neglected and/or failed to release any of the retention sum ie RM489,490.75
for Suit 42 and RM886,723 for Suit 52. It was not disputed in both suits that

I the defendant had undergone a process of being voluntarily wound up by its
member and the defendant had only a sum of RM547,786 cash maintained in
the bank account. The present suits were brought by the plaintiffs for leave to
be granted to the plaintiffs to commence and/or proceed with legal proceedings
against the defendant; and for court's order to preserve the sum of
RM489,490.75 and RM58,295.25 in a separate account pending final

determination of arbitration proceedings (prayers 1–6 of the amended originating summons in Suits 42 and 52). The issues for court’s determination were: (a) whether leave should be granted to the plaintiff; and (b) whether order to preserve retention monies should be granted.

Held, granting prayers 1–6 of the amended originating summons in Suits 42 and 52:

- (1) The claim of the plaintiffs for the release of the retention monies could not be dealt with in the winding up process as the defendant had been voluntarily wound up and there was no avenue for the plaintiff to obtained the relief sought in the winding up process. The relief sought by the plaintiffs could not be dealt with by the liquidator as retention monies did not form part of the general assets of the defendant and were in essence trust monies belonging to the plaintiff. It would be prejudicial to the plaintiff as the monies could be used to pay off the debt owed by the defendant to its creditors and might result in undue enrichment to the latter. Hence, it was only proper that leave be granted to enable the plaintiff to exercise its legal rights to recover the monies from the defendant (see paras 44–46).
- (2) As provision was made for the release of the retention monies in the appendix to the conditions of subcontract in Suits 42 and 52 respectively, there was clear intention to create a trust as the retention monies remained in the beneficial ownership of the plaintiff. The retention monies being trust monies held by the defendant must therefore be returned to the plaintiff upon issuance of the certificate of practical completion and upon the end of the defective liability period respectively. In addition, the sum of RM547,786 in the defendant’s account ought to be preserved and apportioned between the plaintiff in Suit 42 and the plaintiff in Suit 52 in the proportion as proposed by them ie RM489,490.75 and RM58,295.25 respectively. In this regard, the court adopted the rule of *rukun qui prior tempore, potior est jure* (he who is first has the strongest right). For the above reasons, the plaintiffs in Suits 42 and 52 had priority of the equitable interest to the retention monies held in trust for them by the defendant over the other retention sum creditors of the defendant (see paras 66 & 75).

[Bahasa Malaysia summary]

Ini adalah penghakiman berkaitan dua guaman (‘Guaman-Guaman 42 dan 52’) yang telah difailkan oleh dua pihak berbeza, pertama, SK M&E Bersekutu Sdn Bhd (‘plaintif pertama’) dan kedua, Geohan Sdn Bhd (‘plaintif kedua’) terhadap Pembinaan Legenda Unggul Sdn Bhd (‘defendan’). Guaman 42 adalah tindakan yang dimulakan oleh plaintif pertama manakala Guaman 52 adalah tindakan yang dimulakan oleh plaintif kedua. Dalam kedua-dua guaman, plaintif-plaintif telah berhujah bahawa defendan, melalui

- A subkontrak-subkontrak, telah melantik plaintif-plaintif sebagai subkontraktor-subkontraktor untuk menyiapkan kerja-kerja pembinaan. Terdapat peruntukan-peruntukan dalam subkontrak-subkontrak itu yang memperuntukkan bahawa defendan hendaklah melepaskan jumlah wang tahanan selepas keluaran sijil siap kerja dan selepas tamat tempoh liabiliti
- B kecacatan. Plaintif-plaintif telah memenuhi apa yang diperlukan di bawah subkontrak-subkontrak tetapi defendan enggan, cuai dan/atau gagal melepaskan apa-apa jumlah wang tahanan iaitu RM489,490.75 bagi Guaman 42 dan RM886,723 untuk Guaman 52. Ia tidak dipertikaikan dalam
- C kedua-dua guaman bahawa defendan telah menjalani proses penggulungan secara sukarela oleh anggotanya dan defendan hanya mempunyai wang tunai sejumlah RM547,786 yang dikekalkan dalam akaun bank. Guaman-guaman ini telah dimulakan oleh plaintif-plaintif untuk kebenaran diberikan kepada plaintif-plaintif bagi memulakan dan/atau meneruskan dengan prosiding
- D undang-undang terhadap defendan; dan untuk perintah mahkamah bagi mengekalkan jumlah RM486,490.75 dan RM58,295.25 dalam akaun beraingan sementara menunggu selesai penentuan muktamad prosiding timbang tara (permohonan-permohonan 1–6 saman pemula yang dipinda dalam Guaman-Guaman 42 dan 52). Isu-isu untuk penentuan mahkamah adalah: (a) sama ada kebenaran patut diberikan kepada plaintif; dan (b) sama
- E ada perintah untuk mengekalkan wang tahanan patut diberikan.

Diputuskan, memberikan permohonan-permohonan 1–6 saman pemula yang dipinda dalam Guaman-Guaman 42 dan 52:

- F (1) Tuntutan plaintif-plaintif untuk pelepasan wang tahanan tidak boleh dikendalikan dalam proses penggulungan kerana defendan telah secara sukarela digulung dan tiada peluang untuk plaintif memperoleh relif yang dipohon dalam proses penggulungan. Relif yang dipohon oleh
- G plaintif-plaintif tidak boleh diuruskan oleh penyelesai kerana wang tahanan tidak membentuk sebahagian daripada aset am defendan dan pada dasarnya wang amanah yang dimiliki oleh plaintif. Ia adalah memudaratkan kepada plaintif kerana wang itu boleh digunakan untuk melangsaikan hutang yang dibayar oleh defendan kepada pemiutangnya dan mungkin mengakibatkan pengkayaan yang tidak wajar kepada
- H pemiutang. Justeru, ia hanya wajar agar kebenaran diberikan bagi membolehkan plaintif melaksanakan hak-hak perundangannya untuk mendapat semula wang tersebut daripada defendan (lihat perenggan 44–46).
- I (2) Oleh kerana peruntukan dibuat untuk pelepasan wang tahanan dalam lampiran kepada syarat-syarat subkontrak dalam Guaman-Guaman 42 dan 52 masing-masingnya, terdapat niat yang jelas untuk membentuk amanah kerana wang tahanan itu kekal dalam pemilikan benefisial plaintif. Wang tahanan iaitu wang amanah yang dipegang oleh defendan perlu dengan itu dikembalikan kepada plaintif selepas keluaran sijil siap

kerja dan selepas tamat tempoh liabiliti kecacatan masing-masingnya. Selain itu, jumlah RM547,786 dalam akaun defendan patut dikekalkan dan dibahagikan antara plaintif dalam Guaman 42 dan plaintif dalam Guaman 52 dalam pembahagian sepertimana yang dicadangkan oleh mereka iaitu RM489,490.75 dan RM58,295.25 masing-masingnya. Dalam hal ini, mahkamah mengguna pakai *rukun qui prior tempore, potior est jure* (dia yang pertama mempunyai hak paling kukuh). Oleh sebab-sebab di atas, plaintif-plaintif dalam Guaman-Guaman 42 dan 52 mempunyai keutamaan kepentingan ekuiti ke atas wang tahanan yang dipegang atas amanah untuk mereka oleh defendan ke atas jumlah wang tahanan lain pemiutang defendan (lihat perenggan 66 & 75).]

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Notes

For a case on rights to preserve a specific fund in dispute, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 8211.

For cases on proceedings in general, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8219–8241.

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Cases referred to

Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd [2015] MLJU 953; [2015] 5 CLJ 652, HC (refd)

E

Concorde Construction Co Ltd v Colgan (1984) 29 BLR 120, HC (refd)

Craven v Blackpool Greyhound Stadium & Racecourse Ltd [1936] 3 All ER 513, CA (refd)

Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal [2006] 1 MLJ 505, CA (refd)

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Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd And Other Appeals [1991] 1 MLJ 293, SC (refd)

Jartray Developments, Re (1982) 22 BLR 134, ChD (refd)

Kayford Ltd, Re [1975] 1 All ER 604, ChD (refd)

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KWH Technologies Sdn Bhd v Warga Hikmat Kejuruteraan Sdn Bhd (In Liquidation), BP Chemical (Malaysia) Sdn Bhd and Esso Malaysia Bhd [2013] 1 LNS 1131, HC (refd)

MacJordan Construction Ltd v Brookmount Erostin Ltd (1991) Times, 29 October; [1994] CLC 581, CA (refd)

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Merino-ODD Sdn Bhd v PECD Construction Sdn Bhd (formerly known as Peremba Construction Sdn Bhd) [2010] MLJU 2201, HC (folld)

Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd [2014] 4 MLJ 886, CA (refd)

Mosbert Berhad (in liquidation) v Stella D'Cruz [1985] 2 MLJ 446, SC (refd)

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Ng Siok Meng v Plant & Offshore Technology Sdn Bhd [2015] MLJU 617, HC (refd)

Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, intervener) [1996] 2 MLJ 369, FC (refd)

- A *Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor* [2012] 3 MLJ 422; [2012] Vol 1 CA (Mal) 65, CA (folld)
Rayack Construction Ltd v Lampeter Meat Co Ltd (1979) 12 BLR 30, ChD (not folld)
Saunders (Arthur) Ltd, Re (1981) 17 BLR 125, ChD (refd)
- B *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd* [2008] 5 MLJ 191; [2008] 3 CLJ 582, CA (refd)
Wates Construction (London) Ltd v Franthom Property Ltd (1991) 53 BLR 23, CA (refd)
- C *Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners)* [1993] 1 MLJ 149; [1993] 1 AMR 344, HC (refd)
Westech Sdn Bhd (in voluntary liquidation) v Thong Weng Lock (as surviving partner of Thong Kee Trading Co) [2014] 3 MLJ 427; [2014] 8 CLJ 1050, CA (refd)
- D

Legislation referred to

Arbitration Act 2005 s 11, 11(1), (1)(f)
Companies Act 1965 ss 191, 226(3), 254(1)(b), 260, 263(2), 292

- E *Rohan Arasoo Jeyabalah (Harold Tan Kok Leng with him) (Harold & Lam Partnership) for the plaintiff.*
Chong Hooi Yin (Wilson Ho Sheen Lik with him) (Azman Davidson & Co) for the defendant.

F Lau Bee Lan J:

[1] There are two applications filed by the plaintiff before the court which were heard together, namely:

- G (a) Originating Summons No 24NCC(ARB)-42-12 of 2015 dated 6 November 2015 (encl 1) ('Suit 42'), wherein the plaintiff seeks for the following order:
- H (1) that leave be given to the Plaintiff to commence and proceed with the said Originating Summons, and any incidental applications in relation thereto;
- I (2) that leave be given to the Plaintiff to commence and/or proceed with an arbitration against the Defendant in relation to disputes and/or differences between the parties arising from and in connection with the works done by the Plaintiff as the Defendant's sub-contractor pursuant to the Defendant's Letter of Award dated 31/1/2011 ('Sub-Contract') for the execution and completion of the Electrical LV System, Telephone and SMATV System Services for a Project known as 'Cadangan Membina 14 Blok 230 Unit Kedai Pejabat Dan 28 Unit Penthouse (Fasa 5) Yang Mengandungi, (1) 89 Unit (6 Blok) Kedai

- Pejabat 5 Tingkat Berserta 12 Unit 1 Tingkat Penthouse, (2) 141 Unit (8 Blok) Kedai Pejabat 6 Tingkat Berserta 16 Unit 1 Tingkat Penthouse, (3) 3 Tingkat Tempat Letak Kenderaan, (4) 4 unit Pencawang Elektrik, Di Atas Lot PB1, Pusat Bandar 1, Kota Damansara, Mukim Sungai Buloh, Daerah Petaling, Selangor Darul Ehsan — Main Building Works’, and with any incidental applications arising therefrom and/or in connection therewith; (‘Kota Damansara Project’) A
- (3) that leave be given to the Plaintiff to commence and/or proceed with proceedings under the Construction Industry Payment and Adjudication Act 2012 in relation to payment disputes arising from and in connection with the Sub-Contract and with incidental applications arising therefrom and/or in connection therewith; B
- (4) an order that the Defendant preserves a sum of RM489,490.75 by depositing the said sum within 7 days from the date of the Court Order into an interest bearing fixed deposit account with a licensed bank in Malaysia pending the final determination of the arbitration proceedings between the Plaintiff and Defendant in relation to the dispute between the parties arising from and in connection with the works done by the Plaintiff as the Defendant’s sub-contractor under the Sub-Contract, pursuant to s 11 of the Arbitration Act 2005, s 25(2) of the Courts of Judicature Act 1964 and/or ss 50 and 53 of the Specific Relief Act 1950; C
- (5) that either of the parties be given liberty to apply; D
- (6) cost, and E
- (7) further and other relief that this Court shall deem fit and proper to give. F
- (b) Originating Summons No 24NCC(ARB)-52–12 of 2015 dated 23 November 2015 (encl 1) (‘Suit 52’), wherein the plaintiff seeks for the following order: G
- Prayers (1), (3), (5), (6) and (7) — are in the same terms as prayers (1), (3), (5), (6) and (7) in Suit 42 above;
- Prayer 2: H
- (2) that leave be given to the Plaintiff to commence and/or proceed with an arbitration against the Defendant in relation to disputes and/or differences between the parties arising from and in connection with the works done by the Plaintiff as the Defendant’s sub-contractor pursuant to the Defendant’s Letter of Award dated 3/9/2012 (‘Sub-Contract’) for the execution and completion of the Earthwork, Piling, Retaining Wall and Basement Slab for a Project known as ‘Cadangan Dua Blok Pangsapuri Servis Dan Ruang Niaga Di Atas Lot PRD 166961, Mukim Pulau, Daerah Johor Bahru, Johor Darul Takzim Untuk Tetuan Encorp Iskandar Development Sdn Bhd - Earthwork, Piling, Retaining Wall and Basement Slab’, and with any incidental I

A applications arising therefrom and/or in connection therewith ('Mukim Pulau Project').

Prayer 4:

B (4) an order that the Defendant preserves a sum of RM886,723.00 by depositing the said sum within 7 days from the date of the Court Order into an interest bearing fixed deposit account with a licensed bank in Malaysia pending the final determination of the arbitration proceedings between the Plaintiff and Defendant in relation to the dispute between the parties arising from and in connection with the works done by the Plaintiff as the Defendant's sub-contractor under the Sub-Contract, pursuant to s 11 of the Arbitration Act 2005, s 25(2) of the Courts of Judicature Act 1964 and/or ss 50 and 53 of the Specific Relief Act 1950.

D [2] During the hearing on 23 March 2016, in respect of Suit 42 and Suit 52, amendments were made to prayers 2, 3 and 4 of both suits by the plaintiffs. These amendments are reflected in the orders made on 15 April 2016 when I granted OIT of prayers 2, 3 and 4 of encl 1 in both suits. The order in respect of *Suit 42* reads as follows:

E (1) that leave be given to the Plaintiff to commence and proceed with this Originating Summons, and any incidental applications in relation thereto;

F (2) that leave be given to the Plaintiff to commence and proceed with an arbitration against the Defendant in relation to disputes and/or differences between the parties in relation to the retention sum in connection with the works done by the Plaintiff as the Defendant's sub-contractor pursuant to the Defendant's Letter of Award dated 31/1/2011 which the Plaintiff accepted on 13/6/2011 ('Sub-Contract') for the execution and completion of the Electrical LV System, Telephone and SMATV System Services for a Project known as 'Cadangan Membina 14 Blok 230 Unit Kedai Pejabat Dan 28 Unit Penthouse (Fasa 5) Yang Mengandungi (1) 89 Unit (6 Blok) Kedai Pejabat 5 Tingkat Berserta 12 Unit 1 Tingkat Penthouse, (2) 141 Unit (8 Blok) Kedai Pejabat 6 Tingkat Berserta 16 Unit 1 Tingkat Penthouse, (3) 3 Tingkat Tempat Atur Kenderaan, (4) 4 Unit Pencawang Elektrik, Di Atas Lot PB1, Pusat Bandar 1, Kota Damansara, Mukim Sungai Buloh, Daerah Petaling, Selangor Darul Ehsan — Main Building Works', and with any incidental applications arising therefrom and/or in connection therewith;

I (3) that leave be given to the Plaintiff to commence, initiate and/or proceed with proceedings under the Construction Industry Payment and Adjudication Act 2012 in relation to the retention sum in connection with the Sub-Contract and with incidental applications arising therefrom and/or in connection therewith;

(4) *an order that the Defendant preserves a sum of RM489,490.75* by depositing the said sum within 7 days from the date of the Court Order or any other

date that this Honourable Court deems fit into an interest bearing fixed deposit account with a licensed bank in Malaysia pending the final determination of the arbitration and/or adjudication proceedings between the Plaintiff and Defendant in relation to the dispute between the parties in relation to the retention sum in connection with the works done by the Plaintiff as the Defendant's sub-contractor under the Sub-Contract, pursuant to Section 11 of the Arbitration Act 2005, Section 25(2) of the Courts of Judicature Act 1964 and/or Sections 50 and 53 of the Specific Relief Act 1950;

- (5) that either of the parties be given liberty to apply; and
- (6) cost of RM10,000.00 to be paid to the Plaintiff by the Defendant. (Emphasis added.)

[3] The order in respect of Suit 52 is similar to the order made in respect of Suit 42 save for the name of the project and the date of the letter of award in prayer 2 and an order that the defendant preserves the sum of RM58,295.25 in prayer 4 whilst in in respect of the same prayer in Suit 42, the defendant preserves the sum of RM489,490.75.

SUIT 42 — SALIENT BACKGROUND FACTS

[4] The plaintiff formerly known as Kejuruteraan Elektrik Seong Keng Sdn Bhd changed its name to SK M&E Bersekutu Sdn Bhd on 25 March 2011 and carries on business as a mechanical and electrical engineering consultant.

[5] The defendant was formerly known as Encorp Construct Sdn Bhd and about August or September 2015 changed its name to Pembinaan Legenda Unggul Sdn Bhd.

[6] By a letter of award dated 31 March 2011 issued by the defendant and accepted by the plaintiff on 13 June 2011 in respect of the subcontract for the Kota Damansara Project, the defendant engaged the plaintiff as its subcontractor to carry out the subcontract works of providing electrical LV system, telephone and SMATV system services for the sum of RM9,789,815 (exh A3, plaintiff's affidavit affirmed by Lee Kin Seong on 5 November 2015, encl 2).

[7] The plaintiff has since completed the works under the subcontract and the whole of the construction work was certified as practically completed on 30 May 2013. A certificate of practical completion was issued by the project architect on 30 May 2013 (exh A4, plaintiff's affidavit).

[8] Clause 16.3 of the conditions of subcontract to be read together with the appendix therein provides that each and every payment for interim claim

- A** shall be subjected to a 10% retention sum to the maximum limit of 5% of the subcontract price. The total sum retained by the defendant as retention sum under cl 16.3 of the conditions of subcontract is 5% of the subcontract sum, namely RM489,490.75.
- B** [9] The subcontract further provides in the appendix to the conditions of subcontract that the defendant shall release to the plaintiff:
- (a) 2.5% of the retention sum upon the issuance of the certificate of practical completion; and
- C** (b) the balance 2.5% of the retention sum upon the end of the defect liability period.
- D** [10] The defect liability period under the subcontract was for a period of 15 months starting from the date of the issuance of the certificate of practical completion, which has ended on 30 August 2014 as clearly provided for in the certificate of practical completion issued by the project architect dated 30 May 2013.
- E** [11] Although the certificate of practical completion has been issued on 30 May 2013 and the defect liability period has expired on 30 August 2014, the defendant has refused, neglected and/or failed to release any of the retention sum amounting to RM489,490.75 to the plaintiff.
- F** [12] The plaintiff had demanded from the defendant for the release of the retention sum by way of the plaintiff's letters dated 2 December 2014, 15 January 2015, 17 March 2015, 15 April 2015 and 15 May 2015. However, the defendant has continued to refuse, neglect and/or fail to release the said retention sum to the plaintiff (exh A5, the plaintiff's affidavit).
- G** [13] By letter dated 7 July 2015 from the plaintiff's solicitors to the defendant, the plaintiff demanded from the defendant for payment of the sum due and owing by the defendant to the plaintiff amounting to RM1,316,862.90 for work done under the subcontract including variation
- H** works and release of the retention sum (exh A7, the plaintiff's affidavit).
- I** [14] Not having received any response to the letter dated 7 July 2015, the plaintiff's solicitors again wrote to the defendant on 30 July 2015 to demand for the payment of the outstanding debt owed the plaintiff (exh A8, the plaintiff's affidavit).
- [15] On 14 August 2015, the defendant issued a letter signed by its general manager, one Mr Cheah Chong Chye in reply to the plaintiff's solicitor's letters of 7 July 2015 and 30 July 2015 to, inter alia: (i) deny and dispute to the

plaintiff's claim and requested for copies of the statement of account and all supporting documentations pertaining to the plaintiff's claim to enable the defendant to study the matter further; and (ii) mention there was a change in the defendant's management and shareholders recently.

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[16] On 19 August 2015, the plaintiff's solicitors received another letter from the defendant again signed by Mr Cheah Chong Chye, the contents of which are exactly the same as the defendant's letter of 14 August 2015 (exh A9, the plaintiff's affidavit).

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[17] On 7 October 2015, the plaintiff conducted a company search which showed that the status of the defendant to be 'existing' and that the defendant had changed its name from Encorp Construct Sdn Bhd to Pembinaan Legenda Unggul Sdn Bhd (exh A10, the plaintiff's affidavit).

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[18] By letter dated 7 October 2015, the plaintiff's solicitors replied to the defendant's letters of 14 August 2015 and 19 August 2015 to state, inter alia, that the plaintiff had already forwarded to the defendant the plaintiff's final claim dated 1 December 2014 together with the relevant supporting documents, and that the plaintiff had however not received any response from the defendant (exh A11, plaintiff's affidavit). The plaintiff's solicitors' letter to the defendant dated 7 October 2015 was delivered by hand to the defendant at its business address at C4-3A-10, Solaris Dutamas, No 1, Jalan Dutamas 1, 50480 Kuala Lumpur, the said letter was acknowledged receipt by the defendant c/o one Adam Primus.

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[19] On or around 13 October 2015, the plaintiff received two separate notice of meetings of creditors under s 260 of the Companies Act 1965 ('the s 260 notice') both dated 13 October 2015 addressed to the attention of the plaintiff which was received and the other for the attention of Kejuruteraan Elektrik Seong Keng Sdn Bhd (retention). The s 260 notice issued by one Azahar Hollis bin Abdullah by order of the defendant's directors was for: (a) a meeting of creditors on 2 November 2015 at 10am at TDDI to: (i) to lay out the statement of affairs of the defendant; (ii) the nomination of a liquidator; and (iii) to consider the appointment of a committee of inspection; and (b) to propose a special resolution that 'the company be wound-up voluntarily' and that 'Dato' Adam Primus Varghese bin Abdullah be appointed liquidator'.

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[20] According to the list of unsecured creditors in Schedule G attached to the said s 260 notices, the total debt owed by the defendant to the defendant's unsecured creditors amounted to RM91,876,776.62. The said list of unsecured creditors also shows that defendant had categorised its debt owed to the plaintiff of RM1,316,862.90 as a trade debt under 'Trade Creditors — Sub con', and separately the retention sum which the defendant had failed to release

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A to the plaintiff since 2014 under the caption 'Retention Sum' stated in the said list of unsecured creditors as RM514,146.14.

B [21] According to the Companies Commission of Malaysia search result dated 21 October 2015, the defendant's status was reported as 'Winding Up'.

C [22] By letter dated 22 October 2015 from the plaintiff's solicitors to the defendant, the plaintiff gave notice to the defendant pursuant to cl 20.1 of the conditions of subcontract for the parties to attempt for the next 30 days to resolve their dispute amicably before the commencement of arbitration. The said letter of 22 October 2015 was delivered by hand to the defendant's office with an acknowledgement of receipt by the defendant which stated that the defendant is 'In Liquidation'.

D [23] In response to the s 260 notices received by the plaintiff, the plaintiff on 26 October 2015 submitted its proof of debt form dated 26 October 2015 to the provisional liquidator of the defendant. In the proof of debt, the plaintiff claimed as a debt from the defendant the sum of RM802,716.76 *excluding the retention sum of RM489,490.75 which is being held by the defendant in trust for the benefit of the plaintiff*. (Emphasis added.)

F [24] The plaintiff's solicitors attended the creditors meeting on 2 November 2015 as the plaintiff's proxy. The plaintiff have been advised by its solicitors that: (i) the shareholding of the defendant has also been changed but the relevant forms have not been filed with CCM; (ii) the director of the defendant, En Azahar Hollis bin Abdullah, was unable to inform the creditors of the circumstances which led to the voluntary liquidation of the company. All the creditors (and their proxies) were informed that Enfari Sdn Bhd is no longer the shareholder of the defendant company.

G SUIT 52 — SALIENT BACKGROUND FACTS

H [25] The plaintiff carries on business as a foundation, geotechnical and civil engineering contractor. The defendant is the same as the defendant in Suit 42. According to the Companies Commission of Malaysia search result dated 21 October 2015, the defendant's status was reported as 'Winding Up'.

I [26] Under the subcontract, the defendant engaged the plaintiff as its subcontractor to carry out the subcontract works consisting of earthwork, piling, retaining wall and basement slab for the sum of RM17,734,455.55 for the Mukim Pulau Project.

[27] The plaintiff has since completed the works under the subcontract and the whole of the construction work was certified as practically completed on

12 December 2013. A certificate of practical completion was issued by the defendant on 8 January 2014 (exh LKF3 of the plaintiff's affidavit affirmed by Lam Kim Fah on 18 November 2015 (encl 2). A

[28] Based on cl 16.3 of the conditions of subcontract to be read together with the appendix therein which is in similar terms to the same provisions in Suit 42, the total sum retained by the defendant as retention sum is RM886,723. B

[29] The subcontract further provides in the appendix to the conditions of subcontract that: C

- (a) the first moiety shall be released by the defendant to the plaintiff upon issuance of the certificate of practical completion of the main contract works; and D
- (b) the second moiety shall be released by the defendant to the plaintiff upon issuance of the certificate of completion of making good defects of the main contract works.

[30] The defect liability period under the subcontract was for a period of 27 months from the date of practical completion of the main contract works. E

[31] Although the certificate of practical completion has been issued on 8 January 2014 effective 12 December 2013, the defendant has refused, neglected and/or failed to release any of the first moiety of the retention sum amounting to RM443,361.50. F

[32] The plaintiff had demanded from the defendant for the release of the first moiety of the retention sum by way of the plaintiff's letters dated 25 November 2013, 10 January 2014 and 27 April 2015 (exh LKF4 of the plaintiff's affidavit). However, the defendant has continued to fail, refuse and/or neglect to release the first moiety of the retention sum to the plaintiff. G

[33] Although the subcontract works have already been completed since 12 December 2013, the plaintiff has not received any response or payment from the defendant in respect of the retention sum. H

[34] On or around 13 October 2015, the plaintiff received 2 separate s 260 notice in similar terms as the s 260 notice in respect of Suit 42. I

[35] According to the list of unsecured creditors in Schedule G attached to the said s 260 notice the total debt owed by the defendant to the defendant's unsecured creditors amounts to RM91,876,776.62. The said list of unsecured

A creditors also shows that the defendant has categorised its debt owed to the plaintiff in the sum of RM886,723 as 'Retention Sum'.

B [36] The plaintiff's representative attended the creditors meeting held on 2 November 2015 at the Taman Tun Dr Ismail Community Hall. No explanation was given to the creditors by the directors of the company or the provisional liquidator on the circumstances which led to the company's financial state. The creditors were also informed that there was no separate account in the defendant company for monies held on trust.

C [37] By letter dated 4 November 2015 from the plaintiff's solicitors to the defendant, the plaintiff gave notice to the defendant pursuant to cl 20.1 of the conditions of subcontract for the parties to attempt for the next 30 days to resolve their dispute amicably before the commencement of arbitration
D (exh LKF7, the plaintiff's affidavit).

E [38] The undisputed fact in Suit 42 and Suit 52 is that the defendant has undergone a process of being voluntarily wound-up by its members pursuant to s 254(1)(b) of the CA 1965 and Dato' Adam Primus Varghese bin Abdullah has been appointed as provisional liquidator on 2 November 2015.

[39] The defendant has only a sum of RM547,786 cash maintained in the bank account.

F ISSUES

[40] The two primary issues are:

- G (a) whether leave should be granted to the plaintiff to commence and/or proceed with legal proceedings against the defendant who is wound up in Suit 42 and Suit 52; and
(b) whether an order to preserve the sum of RM489,490.75 and RM58,295.25 in a separate account pending final determination should be granted in Suit 42 and Suit 52 respectively.

H FINDINGS

Whether leave should be granted to the plaintiff

- I [41] Section s 263(2) of the CA 1965 states:
263 Property and proceedings.
(2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

[42] In *Westech Sdn Bhd (in voluntary liquidation) v Thong Weng Lock (as surviving partner of Thong Kee Trading Co)* [2014] 3 MLJ 427; [2014] 8 CLJ 1050, the Court of Appeal followed the test laid down by the then Supreme Court in *Mosbert Berhad (in liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 at p 447 which was followed in *Shencourt Sdn Bhd v Perumahan NCK Sdn Bhd* [2008] 5 MLJ 191; [2008] 3 CLJ 582 where at p 440 (MLJ); p 1065 (CLJ) para [37], Abdul Aziz Rahim JCA (as he then was) stated:

[37] We agree that the granting of leave under s 263(2) of the Companies Act 1965 is an exercise of discretion by the court. However in our view, on the authorities, the granting of leave is an exception rather than the norm; *and the only ground to be considered whether leave should or should not be granted is whether the claim can or cannot be dealt with adequately in the winding up or whether the remedy can or cannot be given in a winding up proceedings.* (Emphasis added.)

[43] A similar provision on the requirement for leave of the court is found in s 226(3) of the CA 1965. In dealing with the issue of whether leave ought to be granted under s 226(3) of the CA 1965, the Court of Appeal in *Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd* [2014] 4 MLJ 886 held that further to the principles propounded in *Mosbert* and *Shencourt*, the plaintiff must establish that he has a prima facie case meaning the plaintiff must show that there is a real dispute between the parties which warrant a trial to determine the truth of the combating allegations (per David Wong Dak Wah JCA at pp 893 para [20] D–E, 896 para [24] and 897 para [27]).

[44] Mindful of the aforesaid principles in the aforesaid cases, I am of the view that leave ought to be granted as per the plaintiff's applications in both Suit 42 and Suit 52 for the following reasons.

[45] The claim of the plaintiff for the release of the retention monies amounting to RM886,723 cannot be dealt with in the winding up process as the defendant has been voluntarily wound-up and there is no avenue for the plaintiff to obtain the relief sought in the winding-up process.

[46] The relief sought by the plaintiff relates to the release of retention monies which cannot be dealt with by the liquidator as retention monies do not form part of the general assets of the defendant and are in essence trust monies belonging to the plaintiff (see *Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor* [2012] 3 MLJ 422 at p 433, paras [21] and [22]). Hence it will be prejudicial to the plaintiff as these monies could be used to pay off the debt owed by the defendant to its other creditors and may result in undue enrichment by the latter (this will be addressed in greater detail later). Hence it is only proper that leave be granted to enable the plaintiff to exercise its legal rights to recover the retention monies from the defendant.

A [47] The plaintiff has established a prima facie case against the defendant in that despite having completed the subcontract works pursuant to the terms and conditions of the subcontract for the Kota Damansara Project, the certificate of practical completion being issued on 30 May 2013 and the defect liability period has since expired on 30 August 2014, the defendant has failed, refused or neglected to release the retention monies amounting to RM489,490.75 to the plaintiff.

C [48] Similarly, the plaintiff has established a prima facie case against the defendant in that despite having completed the subcontract works pursuant to the terms and conditions of the subcontract for the Mukim Pulau Project, the certificate of practical completion being issued on 8 January 2014 effective 12 December 2013 and the defect liability period has since expired on 12 March 2016, the defendant has failed, refused or neglected to release the retention monies amounting to RM886,723 to the plaintiff.

E [49] Based on the facts which I have alluded to in Suits 42 and 52 respectively, it is apparent that prior to the defendant being voluntarily wound up the plaintiff has issued several letters to the defendant requesting for the release of the first moiety of the retention monies but the defendant did not respond to the letters which demonstrated the defendant's disregard of their contractual obligations.

F [50] The defendant argued that the plaintiff by choosing to submit its proof of debt to the liquidator ie by filing proof of debt for the sum of RM489,490.75 and RM886,723 in Suit 42 and Suit 52 respectively, cannot now attempt to get a 'second bite' by seeking leave to proceed with legal proceedings ie claiming the same amounts in the respective suits pursuant to cl 16.3 of the conditions of subcontract. In support of this stand, the defendant relied on the case of *Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners)* [1993] 1 MLJ 149 at p 161; [1993] 1 AMR 344 at p 357 (following the English Court of Appeal case of *Craven v Blackpool Greyhound Stadium & Racecourse Ltd* [1936] 3 All ER 513), it was held that a creditor who has selected one method of having his claim adjudicated upon, which gives him the right to question the decision, ought not then to be in a position to select another method of adjudication:

I ... It seems to me, on general principles, that a person who selects one method of having his claim adjudicated upon, if he is dissatisfied with the way in which that adjudication has been decided, *should not be allowed to select another method of having it adjudicated*. It is common knowledge in these matters that the court does not allow two sets of proceedings to go on at the same time in the same matter; *it will stay either one or the other in order that there may not be a waste of costs in asking two tribunals to decide the same question*. (Emphasis added.)

[51] With respect I am of the view that the position taken by the defendant cannot be sustained. I relied on the case of *Qimonda* where the Court of Appeal had to consider amongst others the appellant's (*Qimonda*) contention that the respondents (the first and second respondents being contractor and subcontractor under the building contract with the appellant) are estopped from claiming the retention monies are trust monies when the respondents filed the proof of debt dated 11 September 2009 with the liquidators of the appellant. Ramly Ali JCA (now FCJ) (delivering the judgment of the court) opined at p 435 paras [32] and [33] as follows:

[32] The court agrees with the respondents' counsel that the argument on estoppel is an afterthought, and was only raised after the defence was filed on 16 July 2010. The appellant did not at any material time, after the filing of the proof of debt raise at the issue of estoppel in any of its letters in reply to the respondents' letters stating that the retention monies are trust monies. In any event, whether or not estoppel applies would depend on the facts and circumstances of each particular case. Different facts may lead to different conclusion.

[33] *In the present case, it is clear from the sequence of events before, at the time and after the filing of the proof of debt that the first respondent has clearly maintained its stand that the retention monies are trust monies. During cross-examination, SD1 (one of the joint liquidators) had also clearly agreed that he knew of the fact that the first respondent had not given up its claim that the retention monies are trust monies. Therefore, the appellant cannot be said to have been led to believe by the first respondent's filing of the proof of debt that the first respondent has given up its right to pursue the retention monies as trust monies. The respondents' witness, SP1, had also testified that the filing of the proof of debt was only a precautionary measure by the respondents to safeguard their position and was done without prejudice to the respondents' right to claim for the retention monies as trust monies. (Emphasis added.)*

[52] In the present case, the defendant did not at any time object to the plaintiff's stand that the retention monies are trust monies and neither did the plaintiff object after the filing of the plaintiff's proof of debt on 26 October 2015 in Suit 42 and the same goes in Suit 52. I am of the view the defendant's contention is baseless and an afterthought bearing in mind in the case of *Qimonda*, the Court of Appeal held the filing of a proof of debt does not mean that the contractor has given up its right to pursue a claim for the retention monies as trust monies.

WHETHER ORDER TO PRESERVE RETENTION MONIES SHOULD BE GRANTED

[53] Before I deal with the core arguments of the defendant in opposing the plaintiff's application and in taking the position that the order to preserve retention monies after liquidation should not be granted, I shall dispose the preliminary and ancillary issues first.

- A [54] The defendant contended the plaintiff's prayer for a preservation order (prayer 4 of the amended originating summons) is: (i) premature at this stage as the court has not disposed of the question of whether leave should be granted to the plaintiff to commence any proceedings against the defendant; and (ii) the winding up court is not the proper forum to deal with this issue.
- B [55] I am of the view the aforesaid issues raised by the defendant is a non-starter as the prayer for preservation of the retention monies (prayer 4) is subject to prayers 1, 2 and 3 of the amended originating summons and if leave is refused, then prayer 4 would be rendered academic.
- C [56] The ancillary issue raised by the defendant is that any application under s 11(1)(f) of the Arbitration Act 2005 ('the AA 2005') it can only be made after leave by the winding-up court has been given to the plaintiff.
- D [57] I find there is no merit in the defendant's contention for the same reason I have stated in para 52 above.
- E [58] Section 11(1)(f) of the AA 2005 states:
(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:
...
(f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute ...
- F
- G [59] I agreed with the plaintiff's reliance on s 11(1)(f) is proper. I agreed with the views expressed by the learned judge in *Merino-ODD Sdn Bhd v PECD Construction Sdn Bhd (formerly known as Peremba Construction Sdn Bhd)* [2010] MLJU 2201 wherein the High Court allowed the plaintiff's application to preserve the retention monies pending disposal of the arbitration between the plaintiff and the defendant pursuant to s 11 of the AA 2005. Hence with respect the defendant's attempt to distinguish *Merino-Odd* on the ground that the defendant in that case was not wound up but only faced with winding-up petition and 'as such leave was not required by the plaintiff to obtain the mandatory injunctive order' does not aid the defendant.
- H
- I [60] The defendant's objection to the plaintiff's reliance on *Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd* [2015] MLJU 953; [2015] 5 CLJ 652 by contending that it 'does not relate to a wound up company' is devoid of merit given that *Bumi Armada* is a case on point: on the granting of interim relief pursuant to s 11(1) of the AA 2005.

[61] The crux of the defendant's argument opposing any order of preservation of the retention monies being made are summarily based on the following grounds: A

(a) the defendant does not have the required funds to preserve the sum of RM489,490.75 as it is severely lacking of funds. If the order is granted, the liquidator would not be able to comply with the order; B

(b) the defendant would be given preference over the other unsecured creditors which is against ss 191 and 292 of the CA 1965;

(c) it is not disputed that based on the statement of affairs of the defendant company, the total sums owed to unsecured creditors stands at RM91,876,776.62 with over 250 creditors (around 128 creditors' claims categorised as retention sums); C

(d) the case of *Qimonda* in so far as it relates to whether a trust of monies is created by virtue of a clause in contract is in conflict with another Court of Appeal decision of *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd* (formerly known as *Syarikat Teratai KG Sdn Bhd*) and another appeal [2006] 1 MLJ 505; and D

(e) the court is urged to adopt the approach adopted in the English Court of Appeal case of *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 30, which reasoning was considered and upheld and supported in: E

(i) the English cases of: F

(1) *Re Saunders (Arthur) Ltd* (1981) 17 BLR 125

(2) *Re Jartray Developments* (1982) 22 BLR 134 at p 141:

In my view it is clear both in principle and on authority, that Clause 30(4)(a) of the RIBA conditions imposed an obligation on Jartay to appropriate and set aside the £23,009 retentions as a separate trust fund, and that if RPW had made an application before Jartay went into liquidation the court would have made a mandatory order to that effect; see *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 30. However, it is equally clear in principle that the relief ceased to be available to RPW on the commencement of the liquidation. Accordingly, there being no evidence that any part of the retentions was appropriated or set aside before the liquidation commenced, RPW cannot now claim to be treated as if it had. G

(3) *Wates Construction (London) Ltd v Franthom Property Ltd* (1991) 53 BLR 23: H

... the only way in which the interest of the beneficiaries (the contractor and sub-contractors) in the retention fund could be safeguarded and preserved is if that fund is placed in a separate account and is not used I

- A for the purposes of the employer's business or hazarded in any other way.
- (4) *MacJordan Construction Ltd v Brookmount Erostin Ltd* (1991) Times, 29 October; [1994] CLC 581:
- B But I do not see any reason why the contractual obligation to be implied from cl 30.4.2.1 should be anything more complex than a contractual obligation to appropriate and set aside the requisite sum in a retention fund. That contractual obligation does not, in my opinion, carry with it any equitable interest of a security character in the assets for the time being of the employer.
- C (ii) the Hong Kong High Court case of *Concorde Construction Co Ltd v Colgan* (1984) 29 BLR 120:
- D It was held in that case that condition 30(4)(a) imposed on the employer a clear obligation to appropriate and set aside in a separate trust account the sums retained ... At p 37, this is what the Judge had to say:
- E ... Further, condition 30(4) refers to 'the contractor's beneficial interest therein', and the predicated beneficial interest could only subsist in a fund so appropriated and set aside.
- ...
- F True, I am not bound by that decision, nor am I bound by the decisions in *Re Arthur Sanders Ltd* (1981) 17 BLR 125 and in *Re Jartay Developments Ltd* (1982) 22 BLR 134 which followed it. However, as the principle in the *Rayack* case commends itself to me as good sense which produces a fair result, I consider it should be followed in Hong Kong
- G (iii) the Court of Appeal decision in *Metramac* which referred to *MacJordan* in support of the proposition for requirement of certainty of trust property.
- H [62] The defendant submitted although *Rayack* was considered by the Court of Appeal in *Qimonda*, the aforesaid views expressed by the courts with respect to *Rayack* as per the passages above for the proposition that retention sum type clauses in construction contracts are mere contractual promise or obligation to create a trust and not a trust per se; in other words an obligation to create a trust of monies remains an obligation only until a separate fund is set aside to constitute a valid trust with identifiable trust assets, was not brought to the attention of the Court of Appeal for its consideration in *Qimonda*.
- I

[63] With respect I cannot agree with the position as contended by the defendant. In *Qimonda*, the appellant and the respondents entered into a building contract which provided that the appellant was entitled to deduct the

retention monies from the interim or progress payments payable to the respondents. The retention monies held over by the appellant was to be used for rectification of defects in the respondents' works during the defect liability period were to be released to the respondents upon the issuance of the maintenance certificate or certificate of statutory completion. The appellant was voluntarily wound up; prior to the liquidation it had not released to the respondents the retention monies under the contract. The respondents filed an action against the appellant for a declaration that the retention monies held by the appellant was held on trust by the appellant in favour of the respondents. The appellant opposed the respondents' claim amongst others on the grounds that there was no express provision in the contract stipulating that the retention monies were trust monies; that the retention monies had not been set aside in a separate account as trust monies. The trial judge found amongst others it was implied that the monies was held by the appellant on trust for the respondents. On appeal, the appellant submitted that the fact that the retention monies were not separated into a separate account prior to its liquidation had changed the status of the retention monies as trust monies.

[64] In dismissing the appellant's appeal, the Court of Appeal at p 431 para [12], stated:

[12] There are a number of authorities to suggest that until such time when the retention monies are actually disbursed to the employer for the rectification of defects, the property in the monies, even while they are being held by the employer, reside with the contractor. On the terms of the relevant contract, while the employer may have recourse to the retention monies to meet claims against the contractor under the contract, the beneficial interest of the contractor in the retention monies remains. The employer's interest in the retention monies is 'fiduciary' in nature, in the sense that the employer is the trustee for the contractor in respect of the monies in question (see *FR Absalom Ltd v Great Western Garden Village Society* [1933] AC 592; and *Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd (Syarikat Perumahan Pegawai Kerajaan Sdn Bhd, garnishee)* [1988] 1 MLJ 444).

[65] In determining the issue of whether a trust can be implied where the agreement or contract does not contain an explicit provision that the retention monies be held on trust by the employer, the Court of Appeal at p 431 paras [14] and [15] considered the case of *Re Kayford Ltd* [1975] 1 All ER 604 and *Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd And Other Appeals* [1991] 1 MLJ 293. Thereafter on the same page in para [16] and at p 432 paras [18]–[19] the Court of Appeal concluded:

[16] The court must consider the circumstances concerning the relationship between the parties. A trust (as in the case of *Geh Cheng Hooi* as well as in the present case) can be implied even where the agreements themselves do not contain an express clause as it is clearly manifested in the agreements and the correspondence concerned that it was the intention of the parties to create one. The court must look into the arrangements as to how the monies were deducted from the progress

- A payments under the contract, held and treated by the parties. The court cannot reject the respondent's claim just because they did not choose to enter into an agreement with specific trust clause.
- [18] The purpose of the deduction is to make provision for making good the defects only. If they are not applied for that purpose, it was understood that they would be returned to the contractor after the expiry of the defect liability period. The usage of the word 'deduction' for the creation of the retention monies from the certified sum under cl 22 of the contract further support the fact that the parties recognised that the retention monies are contractor's monies. All the requisites of a valid trust were present and the parties had manifested a clear intention to create a trust since from the outset, the whole purpose of what had been done had been to ensure that the monies remained in the beneficial ownership of the respondents; and a trust is the obvious means of achieving this. As such the retention monies held by the appellant (employer) do not belong to the appellant (employer).
- B
- C
- D [19] The learned High Court judge was right in law and in fact in holding that the retention monies by their very nature and purpose, are trust monies, held by the appellant as trustee for the respondents. The respondents are the beneficial owner of the said monies. The monies are held back by the appellant (as employer) only for a specific purpose, and not on the basis whether there was an express provision for trust. In the circumstances, the retention monies held by the appellant must be held in its capacity as a fiduciary to the trust for the respondents, (see *ABB Transmission & Distributions Sdn Bhd v Sri Antan Sdn Bhd & Anor* [2009] 7 MLJ 644; [2008] 10 CLJ 1 (CA) and *Kumpulan Liziz Sdn Bhd v Pembinaan OCK Sdn Bhd* [2003] 4 CLJ 709).
- E
- F [66] In the present case, in Suit 42 based on cl 16.3 of the conditions of subcontract to be read with the appendix alluded in paras 8–9 above, the defect liability period had expired on 30 August 2014 as mentioned in para 10 above. In Suit 52, based on cl 16.3 of the conditions of subcontract to be read with the appendix alluded in paras 28–29 above, the defect liability period had expired on 12 March 2016 as mentioned in paras 30–31 above. The plaintiff has not
- G received any notice from the defendant of any defects in the works carried out and completed by the plaintiff under the subcontract and that the retention monies would be used for the rectification of defects. As provision is made for the release of the retention monies in the Appendix to the conditions of subcontract referred in para 9 and 29 above in Suit 42 and Suit 52 respectively
- H following the principles enunciated in *Qimonda*, I find there is clear intention to create a trust as the retention monies remained in the beneficial ownership of the plaintiff. Thus it does not matter that the subcontract does not contain an express provision that the retention monies are held on trust by the defendant for the plaintiff. The retention monies being trust monies held by the
- I defendant must therefore be returned to the plaintiff upon issuance of the certificate of practical completion (first moiety) and upon the end of the defective liability period (second moiety) respectively. In this regard, as stated above, the certificate of practical completion was issued on 30 May 2013 and the defect liability period, which was for a period of 15 months as set out in the

appendix to the conditions of subcontract, had expired on 30 August 2014.

A

[67] With respect I disagreed with the defendant's contention that the decision of the Court of Appeal in *Qimonda* is in conflict with *Metramac*. At 543G–H, the Court of Appeal considered the law governing a trust and re-affirmed the position for a valid trust to be created, there must exist the three elements of certainty of intention, subject matter and the certainty of the object of the trust. Whilst the use of express terms would negate any doubt as to the existence of a trust, nevertheless the Court of Appeal in *Qimonda* at pp 431–432 [16] held even when there are no express terms used, the court can still determine the existence of a trust from the circumstances concerning the relationship between the parties. The same approach was adopted by Mary Lim J (now JCA) in *Ng Siok Meng v Plant & Offshore Technology Sdn Bhd* [2015] MLJU 617 at para 32 and *KWH Technologies Sdn Bhd v Warga Hikmat Kejuruteraan Sdn Bhd (In Liquidation)*, *BP Chemical (Malaysia) Sdn Bhd and Esso Malaysia Bhd* [2013] 1 LNS 1131 (HC).

B

C

D

[68] In the context of the present case, although no express terms has been used in the subcontract, I find all the three elements to establish a valid trust are present in Suit 42:

E

- a. The intention of the Plaintiff and Defendant to create a trust has been manifested as the terms of the Sub-Contract provide that —
 - i. 2.5% of the retention sum shall be released by the Defendant to the Plaintiff upon issuance of the Certificate of Practical Completion; and
 - ii. the balance 2.5% of the retention sum shall be released by the Defendant to the Plaintiff upon the end of the Defect Liability Period.
- b. There is certainty that the trust property is the retention monies and the quantum of the beneficial interest is the sum of RM489,490.75 being held by the Defendant on behalf of the Plaintiff.
- c. The object of the trust is certain in that it is the Plaintiff.

F

G

H

[69] Similarly in Suit 52, notwithstanding the absence of express terms been used in the subcontract, the existence of the trust is established:

- (i) The 1st moiety shall be released by the Defendant to the Plaintiff upon issuance of the Certificate of Practical Completion of the Main Contract Works; and
- (ii) The 2nd moiety shall be released by the Defendant to the Plaintiff upon issuance of the Certificate of Completion of Making Good Defects of the Main Contract Works.

I

- A b. There is certainty that the trust property is the retention monies and the quantum of the beneficial interest is the sum of RM886,723.00 being held by the Defendant on behalf of the Plaintiff.
- c. The object of the trust is certain in that it is the Plaintiff.

- B [70] With respect I find the position propounded in *Rayack*, *MacJordan* and followed/supported in the other cases referred to in para 61 above which the defendant is urging this court to follow has been rejected in *Qimonda* when the Court of Appeal adopting the approach of *Re Kayford* where it was held that a party can be bound by a trust even if there are no effective banking arrangements, at p 433 para [21] opined as follows:

- C [21] There is no requirement that the retention monies held by the appellant must be kept in a separate bank account. It does not change the status of the said monies as trust monies held for the specific purpose. There is also no requirement that the respondents (as contractor) must request for the monies to be kept in a separate bank account.
- D

[71] Further on the same page at paras 22 and 23, the Court of Appeal stated:

- E [22] Thus, the retention monies cannot form part of the general assets of the appellant. In an appropriate case, the court can still order for the preservation or release of the retention monies even after winding up proceedings have been presented against the appellant or the appellant is in the process of liquidation. The failure to separate the retention monies from the common funds of the appellant prior to the appellant's liquidation did not, and cannot defeat the trust (see *Re Kayford Ltd*; *Syarikat Pembinaan Woh Heng Sdn Bhd v Meda Property Services Sdn Bhd* (SG-24-1169 of 2001) (unreported) and *Merino ODD Sdn Bhd v PECD Construction Sdn Bhd* [2009] MLJU 671).

- F [23] The setting aside, release or preservation of the retention monies where the appellant is under liquidation does not amount to a preferential payment under s 223 of the Companies Act 1965 for the simple reason that the said monies are trust monies and do not belong to the appellant in the first place.
- G

- H [72] It is important to note that the Court of Appeal decision of *Qimonda* has been upheld by the Federal Court. In footnote 61 at p 420 of the book, *Construction Adjudication in Malaysia* by Lam Wai Loon and Ivan YF Loo, the learned authors stated that the appellant's application for leave to appeal against the decision of the Court of Appeal was dismissed by the Federal Court on 31 October 2011. This court is bound by the principle of stare decisis to follow *Qimonda*.
- I

[73] Further it is pertinent to note that the Court of Appeal decision in *Qimonda* has been recognised as a good decision in relation to the issue concerning retention monies which are held by an employer on behalf of a

contractor in a construction contract. The fact that the said decision has gained international acclamation is evident from the various excerpts as follows:

- (a) in *Building Law Reports* of the Court of Appeal decision of *Qimonda Malaysia Sdn Bhd v Sediabena Sdn Bhd and Another* [2012] Vol 1 CA (Mal) 65 at p 66, particularly in the commentary section, it is stated:

This fine decision is to be welcomed as a clear and practical exposition on what is often considered to be a thorny and difficult area of the law.

- (b) in an English article titled 'Retention Money and Insolvency: A Common Sense Approach' by Mills & Reeve where the author commented of the Court Appeal decision of *Qimonda* as follows:

Clearly, this decision is not binding in England, but its (arguably) common sense approach may influence the English courts in the future. Contractors would no doubt welcome a degree of certainty on this issue, especially in the current economic climate.

- (c) in an article titled 'Recovering retention monies' by Wright Hassall, the author made specific reference to the Court of Appeal decision in *Qimonda* as follows:

As far as English law is concerned, the Court of Appeal decision in *Mac-Jordan* will outrank the judgment of the Court of Appeal of Malaysia which is only influential. However, the strength of the arguments in *Qimonda* might justify a further review of the law of retention by the English courts. The issue of the contractor's entitlement to retention in the event of insolvency of the employer is particularly important in the present poor economic climate.

The *Qimonda* case also raises new issues over the status of the retention fund under English sub-contracts and the interests of the sub-contractor in the sub-contract retention fund.

[74] The plaintiff, SK M&E Bersekutu Sdn Bhd in Suit 42 contended that since it is the only first party to have filed the action seeking an order for the preservation of retention monies and the plaintiff, Geohan Sdn Bhd in Suit 52 being the only second party to have filed the same action, they should be given priority over the other retention sum creditors of the defendant.

[75] I agreed with the plaintiff's submission that the sum of RM547,786 which the defendant currently has ought to be preserved and apportioned between the two plaintiffs in Suit 42 and Suit 52 in the proportion as proposed by them ie RM489,490.75 and RM58,295.25 respectively. In this regard I adopted the rule of *qui prior tempore, potior est jure* (he who is first has the strongest right). For support thereof, this rule is referred in a passage from *Halsbury's Laws of England* (4th Ed) at p 882 cited by Peh Swee Chin FCJ (as he then was) in *Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership)*

A (*Perwira Habib Bank Malaysia, intervener*) [1996] 2 MLJ 369 at p 385 E–F as follows:

B Where the legal estate is outstanding, the priority of equitable interests is prima facie governed by the rule *qui prior est tempore, potior est jure* (he who is first has the strongest right). The rule will be excluded if there is an act or omission by the prior equitable owner of such a character as to justify his title being postponed and, in certain cases, if he fails to effect registration in respect of his interest. *The rule follows from the principle that equitable interests depend on the creation of a trust. The creation of a trust vests an interest in the subject matter of the trust in the beneficiary*, and this interest cannot be postponed to a subsequent interest except upon grounds which justify the interference with it as a vested interest. (Emphasis added.)

C For the reasons given it is my respectful view that the plaintiffs in Suit 42 and Suit 52 have priority of the equitable interest to the retention monies held in trust for them by the defendant over the other retention sum creditors of the defendant.

D CONCLUSION

E [76] In the circumstances I accordingly made the order and granted prayers 1, 2, 3, 4, 5 and 6 of the amended originating summons in Suit 42 and Suit 52.

Prayers 1–6 of the amended originating summons in Suits 42 and 52 granted.

F Reported by Dzulkarnain Ab Fatar

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